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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION
COMMISSION, et al.,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.,

Respondents.

**BRIEF OF THE ATTORNEYS GENERAL
OF THE STATES OF CALIFORNIA AND MISSOURI,
AMICI CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO**

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I. INTEREST OF THE AMICI

The fundamental interest of the States of California and Missouri in seeing that a diminution of the authority of their anti-discrimination agencies does not occur is indicated by the forceful statement of policy contained in California Fair Employment Practice Act:

“It is hereby declared as the public policy of this State that it is necessary to protect and

safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry.

"It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons, foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." (Calif. Lab. Code § 1411.)

The Missouri Fair Employment Practice Act (Chapter 296, Revised Statutes of Missouri, 1961 Cum. Supp.) states a similar policy of the State of Missouri although not in express terms. The Missouri Act provides that discrimination in employment by reason of race, creed, color, religion, national origin or ancestry is prohibited by employers coming within the purview of the Act, and an enforcement procedure is established. Thus, inherent in the Act is expressed the above policy stated in the California Act.

Substantial numbers of persons are employed by interstate carriers in the States of California and Missouri. Thus to excise interstate carriers from the jurisdiction of the FEPC is to substantially restrict the ability of these states to effectuate their anti-discrimination policies, which as indicated by the statements quoted above, is motivated by matters of deep concern to the states.

II. ARGUMENT (REASONS FOR GRANTING THE WRIT)

A. THE QUESTION PRESENTED IS ONE OF SUBSTANTIAL IMPORTANCE NOT HERETOFORE DETERMINED BY THIS COURT

The eradication of employment discrimination presents one of the most compelling social problems of our time. Since the federal government has left the matter largely unattended, attempts at solution have been undertaken by a growing number of states. However, the holding of the court below in the instant case brings into question the degree of potency of state action in this field. Doubts in this respect may inhibit the states from acting in borderline areas. Because of the urgency of the problem of employment discrimination, a state should not be unnecessarily deterred from bringing the whole range of its jurisdiction within the system it has devised to combat the problem. Any doubts as to the limits of state jurisdiction in the anti-discrimination field can be finally resolved only by a ruling of this court. Thus the petition for the writ of certiorari should be granted.

B. THE JUDGMENT BELOW WAS ERRONEOUS (PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT)

1. As Judged by the Balance of Interest Test

In recent years this court has been determining the existence of a burden on interstate commerce, upon the pragmatic basis of whether in a particular case a given state interest has more weight than the

national interest in unrestricted commerce. As was said in *California v. Zook*, 336 U.S. 725, 728:

"Absent congressional action, the familiar test is that of uniformity versus locality: If a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."

Therefore, if the state interest was predominant, a state statute was upheld even though it did have some effect on the free flow of commerce. (*California v. Zook*, *supra*, at 735.) For example, in the case of *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, this court held that a state statute specifying the maximum weight and width of vehicles traveling its highways was valid although it affected interstate vehicles. The court reasoned that the state had an interest in protecting its highways that outweighed any national interest in the free flow of commerce. In the case of *Clark v. Poor*, 274 U.S. 554, this court held that an Ohio statute requiring a certificate and extra tax from vehicles using the highways within the state was valid. Here the state interest in the upkeep and maintenance of their highways was deemed greater than the national interest in keeping commerce free of such state regulation.

The case presently before the court concerns the Colorado Anti-Discrimination Act commonly known in most other states as Fair Employment Practice Acts. The United States Government has no National Fair Employment Practice law. Therefore, this cannot be a case of conflicting statutes in the field of Fair Employment legislation. Only the state law is involved, and the question that has been posed is whether or not the Colorado law as it affects interstate commerce is an undue burden on that commerce and therefore invalid at least in this respect. Of course, our federal government is concerned about nondiscrimination in employment, but it has not as yet responded to this interest by passing a Fair Employment Practice Act. But today some twenty-two states in our Union have become concerned about the problem to the extent of passing laws outlawing discrimination in employment. The state interests in prohibiting such conduct are numerous. Discrimination in employment increases unemployment within the state; it affects the total earning and buying power of its population. It depresses the potential wealth of the state by depriving the state of the fullest utilization of its capacities for development and advancement, thus substantially and adversely affecting the interests of employees, employers, and the public in general.

It is therefore clear that the state interests to be protected in this case are of prime magnitude. On the other hand, the obstruction to the free flow of commerce effected by the state's anti-discrimination

law, if at all existent, would at most be minor and incidental. Thus it cannot properly be said that "the state interest in this case is outweighed by a national interest in the unhampered operation of interstate commerce." This proposition is amplified by the fact that State Fair Employment laws are an affirmative implementation of a constitutional policy of the utmost weight, the providing of equal protection. Therefore we submit that the outweighing of State interests should be clearly apparent before its measures in pursuance of this grave constitutional policy be deemed an undue burden on interstate commerce.

2. As Judged by the Uniformity Test

But the Colorado Supreme Court chose to base its conclusion on the more traditional test of whether there is a need for national uniformity. (368 P. 2d at 973, 974-5). Granting that the requirements of national uniformity of regulation are still a significant criterion in the determination of what constitutes an unconstitutional burden on interstate commerce, we respectfully submit that the requirement of nondiscriminatory hiring policies is *not* that type of regulation which is "of such a nature as to require exclusive legislation by Congress." (*Cooley v. Board of Wardens*, 12 How. 299, 319.)

The uniformity criterion was not arbitrarily fabricated as a mere convenience for decision making, nor conjured without reference to the factual realities of commercial obstructions. On the contrary, the cases proclaiming this principle constitute a catalog of

concrete examples wherein a multiplicity of regulatory sources would indeed frustrate the free flow of interstate commerce. Thus, in overturning a state law on this ground, there must be an existence of those factors leading to the obstruction of commerce.

For example, in overruling a state statute outlawing passenger segregation on common carriers, this court in *Hall v. De Cuir*, 95 U.S. 485, describes the very real disruption to interstate commerce that would be engendered by lack of uniformity in this area of law:

"On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed, from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be." (95 U.S. 485 at 489.)

In the more recent *Morgan v. Virginia*, 328 U.S. 373 (1946), this court applied the principles enunciated in *Hall* to a Virginia statute requiring segregation. Again, the need for a single source of authority

in the area of racial segregation of passengers on interstate carriers was demonstrated by detailed exposition of the inconveniences and obstructions to the free flow of commerce that would result if diverse regulations were countenanced (328 U.S. at pp. 381-386).

From these cases the Colorado Supreme Court purports to discern this as the rule established by the United States Supreme Court: Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. However, the Colorado Court omits a vital step in arriving at this conclusion. It failed to require a demonstration of *why* the subject of the particular law in question demands regulation by a single source. Mere reference to *Hall* and *Morgan* does not obviate this requirement. These cases merely proclaim the general principle within which each concrete case must be decided. Thus, in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960), a case which approved of the uniformity principle announced by *Hall*, this court refused to overturn a local regulation attacked as an impermissible burden on interstate commerce, because of a failure to show any "competing or conflicting local regulation" (362 U.S. at 448).

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, another case accepting the premises of *Morgan* and *Hall*, this court again upheld local regulation. Here it was pointed out that local regulation is not precluded

where the factual situation negated the need for a single source of regulation. Such factors as "the attenuating effects" upon interstate commerce likely to result from enforcement of the state regulation and "any actual probability of conflicting regulations by different sovereignties" were deemed relevant in reaching this conclusion. (68 S. Ct. at 363.)

In the instant case, we submit, there has been a complete absence of those factors demanding regulation by a single source. *Hall* and *Morgan* did not proclaim that racial regulations per se were an unreasonable burden when applied by the states. It was the potentiality of diverse laws among the states that necessitate reserving this subject to a single regulating source, but today this potentiality has been precluded by the rulings of this court which render state law requiring discrimination by common carriers repugnant to the equal protection clause. (*Brown v. Board of Education*, 347 U.S. 483; *Browder v. Gayle*, 352 U.S. 903; *Bailey v. Patterson*, 369 U.S. 31.) Thus, an interstate carrier which is compelled to obey the anti-discrimination laws of one state will not be confronted with harassment of conforming to segregation laws as it crosses into other states although this was the very real "embarrassment" that would have been inflicted upon the carrier had the local law been upheld at the time *Hall* and *Morgan* were decided.

Therefore, while *Hall* and *Morgan* are still vital as authority for the proposition that state regulation in an area demanding regulation from a single

source constitutes an undue burden on interstate commerce, we respectfully submit that they can no longer stand for the proposition that antidiscrimination regulations applicable to interstate carriers are beyond the province of state imposition. On the contrary, such local regulation now constitutionally insulated from conflicting laws is manifestly in aid of the clearly enunciated Federal policy of equal protection.

III. CONCLUSION

Because the question of jurisdiction of state anti-discrimination agencies is one of substantial importance and because the court below in limiting such jurisdiction did not properly apply the rulings of this court, it is respectfully urged that this court grant the petition for writ of certiorari so that the jurisdictional limitations in question may be authoritatively defined.

Dated, September 27, 1962.

Respectfully submitted,

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